United States Court of Appeals

for the Second Circuit

PETITION FOR REHEARING EN BANC

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P/S

74-2651

In The

United States Court of Appeals

For The Second Circuit

UNITED STATES OF AMERICA,

Appellee,

vs.

ORLANDO MIRANDA,

Defendant-Appellant.

PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC BY ORLANDO MIRANDA, AND MOTION IN THE ALTERNATIVE FOR A STAY OF MANDATE PENDING CERTIORARI

IRVING ANOLIK
Attorney for Defendant-Appellant
225 Broadway
New York, New York 10007
(212) 732-3050

(9041)
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To the Honorable Circuit Judges Smith and Timbers and District Judge Bryan:

Honorable Sirs:

Orlando Miranda, the appellant herein, respectfully presents this petition pursuant to the rules of this Court, wherein he is seeking a rehearing and reconsideration of this Court's decision and opinion rendered the 3rd day of December, 1975, which unanimously affirmed a judgment of conviction of the United States District Court for the Eastern District of New

York, convicting Miranda of violating the narcotics laws (21 U.S.C. §§841(a)(1), 841(b)(1)(A), and 812), after trial before Honorable Orrin G. Judd and a jury. Defendant is presently on bail pending a final determination by this Court.

REASONS FOR GRANTING A REHEARING

A. Preface

This is a most unusual case since the issues presented are quite singular. We submit, however, that the errors are so egregious that only a reversal could rectify the harm done.

In addition, we maintain that this is an appropriate case for *en banc* consideration. This is because of the fact that the integrity of the judicial process is involved which should invoke not only constitutional concepts of due process and fundamental fairness, but should invoke the supervisory powers of this Court over the conduct of trials in district courts within this Circuit.

It is significant in itself, we maintain, that this Panel took almost nine months to decide this case, which is an unusual length of time.

The background of the case is set forth in the opinion of this Court dated December 3, 1975, beginning at Slip Opinion, page 6545 and extending to Slip Opinion, page 6568.

From the factual point of view, we call this Court's attention to Slip Opinon, page 6550, where *this Court made serious error in its recitation of the facts,* which we believe is very significant. There, the opinion recites that on April 2, 1974, when Rodas went to the Jaguar Lounge to allegedly deliver $4,000 "final payment to Miranda," that the radio transmitter produced an "inaudible" tape. This is absolutely not correct since trial counsel recalls there were about five pages of transcript which were handed to the defense counsel at trial, only a portion of which was inaudible.

It is quite important to recognize, however, that of the substantial portion of the tape which was in fact audible, there is no mention whatsoever made of $4,000.

We respectfully submit that this Court should rehear and reconsider its decision, based upon its mistake with reference to this fact alone. It hardly seems possible that there would not have been any mention of $4,000, or any other sum, in a five page transcript. This transcript tended to support Orlando Miranda's assertion that the prior tape, which mysteriously disappeared, did not contain anything incriminating against him.

B. Argument

I. The first contention which this Court addressed itself to in its opinion was the fact that the prosecution had lost, misplaced, or possible destroyed, a tape of an important conversation which allegedly occurred on March 25th between Rodas and Miranda, wherein agent Castillo (who eavesdropped) and Rodas asserted Miranda said things in Spanish which were self-incriminatory. It will be recalled that the assistant prosecutor did not voluntarily reveal the fact that this tape had existed and was no longer available, but was forced to admit this fact.

We ask this Court to review again in light of the April 2, 1974 tape, which does exist, whether the Trial Court was justified in refusing to suppress the conversation on the 25th of March altogether.

In view of the April 2, 1974 conversation, a very large portion of which was audible and is preserved and which mentions nothing about $4,000 or any other money, we believe that the Trial Court should have been motivated to recognize that there could have been other reasons for the disappearance of the March 25th tape.

We submit that particularly in view of the April 2nd oape, which was not incriminatory of defendant, coupled with recent revelations of highly questionable practices among law enforcement agencies seeking to obtain convictions, that a rehearing is certainly warranted and that upon such rehearing there should be a reversal.

It is interesting to note that in footnote 3 beginning at Slip Opinion, page 6551, this Court strongly condemned the conduct of the prosecutor in connection with this case and yet failed to take punitive measures to redress the wrong so far as the defendant is concerned.

In *Lee v. Florida,* 392 U.S. 378, the Supreme Court of the United States noted that deterrence requires more than merely penalizing the prosecutorial authorities, since that virtually never occurs.

We are not seeking vengeance on the prosecutor since his motives may very well have been the result of misguided zeal. We are, however, asking this Court to reverse as a deterrent, and because of the prejudice to appellant.

It will be recalled that even at argument of this appeal the trial prosecutor did not even concede that he had done anything wrong. On the contrary, he maintained the propriety of his position.

Deterrence of official illegality or impropriety has been the primary reason for raising to constitutional dignity of the exclusionary rule with respect to motions to suppress (compare *Mapp v. Ohio,* 367 U.S. 643, 655-656 (1961) with *Wolf v. Colorado,* 388 U.S. 25, 28 (1949)).

This Court made an anachronistic ruling, unfortunately, and has placed this case in that category of decisions which had been exemplified by Justice Cardozo's phrase in *People v. DeFore,* 242 U.S. 13, 21, where he indicated that the guilty may not go free "because the constable has blundered." The so-called "*DeFore* ruling" was rejected in *Mapp v. Ohio, supra,* but has apparently now been resurrected by the decision in this case.

There is no question but that the important tape recording of March 25th "disappeared" and that the Government sought to suppress this fact from the knowledge of the defense. Indeed, the prosecutor at trial made a grossly misleading statement which this Court ruled in footnote 3 ". . . left the impression that there had been no tape recording of the March 25th conversation."

We believe that *Brady v. Maryland,* 373 U.S. 83 (1963), as further explained in *Moore v. Illinois,* 408 U.S. 786, at 809-810, and *Giglio v. United States,* 405 U.S. 150, 154, requires that a conviction be vacated even where "mere neglect" is involved on the part of the prosecution in the suppression of evidence which could be favorable to the defense.

In the case at bar, unlike the case cited in this Court's opinion, the trial prosecutor sought to affirmatively keep the information from the Court and defense counsel that a tape had existed which had disappeared.

In its original opinion in the case at bar, this Panel apparently was misled or fell into error in writing that the April 2, 1974 meeting, wherein allegedly $4,000 was delivered, produced an inaudible tape. Now that this Court is made aware of the fact that such is not the case at all and that substantial portions of that tape exist and are audible, but do not mention $4,000 at all, we submit this should militate strongly in favor of Miranda's contention that the March 25th meeting similarly produced no incriminating conversation.

This Court distinguishes *United States v. Bryant*, 439 F.2d 642 (D.C. Cir. 1971 — *Bryant I*) and *United States v. Bryant*, 448 F.2d 1182 (D.C. Cir. 1971 — *Bryant II*) from the case at bar. We cannot fathom why this Court assumes good faith, or at least lack of bad faith, on the part of the Government, when it is obvious that there was a deliberate misrepresentation made to the Court and to the defense counsel (Slip Opinion 6551 and footnote 3), and then there was a defense of that position made without regret or remorse during the oral argument of this case before the Circuit Court.

The *Bryant II* case cautioned that the Government had to preserve evidence, otherwise it had to forfeit prosecution.

The Court in *Bryant II* at 1184 stated "In the future, of course, investigative agencies will not be allowed to excuse non-preservation of evidence by claiming that it contained nothing of interest to the defendants."

We believe that the impact of such cases as *Bryant I* and *II* and *United States v. Pfingst*, 490 F.2d 262, 277 (2 Cir. 1973), *cert. denied*, 417 U.S. 919 (1974) and *United States v. Morell*, (2 Cir., 8/29/75), as well as *United States v. Consolidated Laundries Corp.*, 291 F.2d 563, 570-71 (2 Cir. 1961), and other cases cited in the opinion of this Court in the case herein, warrant a rehearing, and even for *en banc* determination so as to set proper standards in such cases.

Irrespective, however, of any other consideration, a reversal is warranted so that the Government shall be deterred from future activities of this sort (*Mapp v. Ohio, supra).*

At 6561 of the Slip Opinion in the case at bar, this Court declares that the "recording was irretrievably lost, there is no way in which it can be determined with certainty what it contained." The Government urged that if the recording of March 25th had not been lost, that it would have confirmed and corroborated the recollections of Rodas and Castillo. Yet this Court assumed that there was no measure of comparison because it unfortunately asserted that the April 2nd. 1974 recording was also unintelligible and, therefore, for all intents and purposes, non-existent. Yet we have advised this Court, as trial counsel has advised appellate counsel, that about five pages of the April 2, 1974 recording were made available and that only small portions thereof were unintelligible. The substantial portions that were intelligible did not reveal anything incriminatory and certainly mentioned nothing about the alleged $4,000 which was supposedly to be passed on April 2nd. This impugns the reliability of what occurred on March 25 as well.

We submit that with that standard of comparison, that is the April 2, 1974 tape, it is manifest that since the position of Rodas was that she paid $4,000 on that day to Miranda, and yet the tape does not bear her out, that it is inferable that Miranda would have been borne out in his version of what occurred on March 25th rather than Castillo-Rodas. The unintellible portion of April 2nd raises no inference that it included reference to $4,000.

We maintain that it is a highly suspicious and ominous circumstance when an essential piece of evidence such as the March 25th tape suddenly disappears and the Government seeks to suppress that fact. Why should this Court therefore just blandly accept the statement of agent Castillo that his recollection of the conversation of March 25th is accurate or truthful? Only the conversation as recorded would have been valid.

The Government came in to the Trial Court with *unclean hands* because in the *pretrial* discussions it had failed to reveal the disappearance of the March 25th tape and made no effort to reveal that to anyone. The Government also came into *this Court* with *unclean hands* by staunchly defending the actions of the trial prosecutor in the way he conducted himself at trial.

This Court, however, gives him a gentle slap on the wrist and says that it should not have been done. Yet the effect upon the fairness of the trial or the effect upon the nature of the preparation for trial might have been completely different had the defense been aware of the existence of this tape.

We do not know what efforts were made to find the tape because we only have the word of the Government who itself is responsible for its disappearance, to say what was done. In this case the Government need not necessarily be believed because they have exhibited bad faith, and the April 2nd tape is not incriminatory.

II. In addition to the foregoing, it is significant that there are other serious errors which were not sufficiently explored, we maintain, in the original opinion of this Court.

In addition to the suppression of the tape by virtue of its disappearance, the Government also sought to suppress the identity of the two women who frequently accompanied Rodas, namely "Georgie" and "Toni," who were not called as witnesses by the prosecution but who had admittedly been at the Jaguar Lounge on many occasions when Rodas met Miranda.

While it is quite true that Rodas testified that "Georgie" and "Toni" were at the Jaguar Lounge from time to time when she met Miranda there, it was only Rodas who declared that they were not present at any of the conversations she had with Miranda concerning narcotics.

In footnote 7 at Slip Opinion 6564, this Court declares that Miranda never contradicted Rodas' statement. We submit that he did not confirm it either and that only the witnesses, "Georgie" and "Toni," could have testified and be subject to cross-examination as to what actually occurred.

The fact remains that they were very frequently together in conversations between Rodas and Miranda. That fact in itself made them important witnesses so far as the defense was concerned. This Court apparently overlooked the warning of the Trial Court that defense counsel could *not* go into the background of "Georgie," and also precluded defense counsel from saying anything further with respect to "Toni" (83, 84).

Moreover, it is very significant that while Rodas was searched by the agents apparently, neither "Georgie" nor "Toni" had been searched, and it is extremely possible that any material which might be significant to the case was either removed or supplied by "Georgie" and/or "Toni." The defense, of course, was foreclosed from making any such inquiry. Rodas was seeking to escape a drug charge herself and could have framed Miranda.

Rodas, and even "Georgie," were anxious to get themselves out of a great deal of trouble that they themselves were in with respect to narcotics. We ask rhetorically, whether or not it is beyond belief that "Georgie" and/or "Toni" might have supplied the cooperating witness, Rodas, with narcotics and taken the money from her on the 25th of March, rather than Miranda altogether.

Miranda ran what appeared to be a completely legitimate business, and took the stand in his own defense and categorically denied any involvement.

The Government lost, destroyed, or otherwise failed to find the most important piece of corroborative evidence in the entire case, namely the March 25th tape.

As we have already said, this Court was confused into believing that no other tape existed with respect to any allegedly incriminating meeting. Yet, on April 2, 1974, at the Jaguar Lounge, a meeting did take place when $4,000 was supposed to be turned over to the defendant by Rodas, but the four or five pages of transcript of that recording fails to reveal anything mentioning money or anything else incriminatory concerning the defendant. The portion of that tape which was inaudible does not permit an inference that it related to the $4,000 or any other money.

This Court, in its opinion, was unable to draw a comparison therefor between the two tapes, namely the one of April 2nd, most of which is in existence, and the one of March 25th, which was "lost." Had this Court been aware of the fact that the transcript of the April 2nd meeting exists, perhaps it would have come to a different conclusion.

We submit that at the very least this Court should listen to or at least read the transcript of the April 2nd conversation and then determine whether or not it should come to a different conclusion as to that aspect of the case.

In any event, "Toni" and "Georgie" were in a position to have supplied Rodas with narcotics and taken money from her, and there is, therefore, every reason to believe that the defense was completely sincere in its desire to subpoena and interview these women.

The belated permission granted to the defendant to interview "Georgie," but not "Toni," was hardly consistent with proper preparation for trial. At the last minute, almost at the conclusion of the trial, to have offered this interview of "Georgie" to defense counsel, was hardly sufficient to permit him to prepare a witness as he should have done. We must remember that Mr. Todel, who represented Miranda at the trial, was a former Executive Assistant United States Attorney, and was extremely experienced in these matters. He well knew how important it was to properly interview and prepare a case, particularly one as serious as the case at bar.

Ironically, as we have pointed out, Mr. Todel was also the trial counsel in *United States v. Baum*, 482 F.2d 1325 (2 Cir. 1973), where again the Government denied access to an important witness, except at the virtual conclusion of the trial. In the *Baum* case, the Court at least reversed for that reason.

Here, where the circumstances are vastly more prejudicial and egregious than the *Baum* case, this Court contents itself with affirming with a slight reprimand to the prosecutor.

To make matters worse, both Rodas and "Georgie," who the Government admitted had pleaded guilty to a narcotics conspiracy and were "cooperating with the government," refused to divulge or disclose the identity or whereabouts of "Toni." The Government indicated that it was at a loss to do anything about this. It is obvious that the *contempt power* of the District Court and recommendations by the Government for severe penalties against Rodas and Georgie were certainly available.

It is inconceivable that both the Trial Court and the Government should figuratively throw up their hands and say that cooperating Government witnesses refuse to divulge the identity of a possibly extremely important witness, and that there is nothing we can do about it. This is almost laughable in view of the cases which are read about persons being clamped in jail for months, sometimes years, for refusing to answer questions. We wonder what would have happened if Rodas refused to testify for the Government after taking the stand voluntarily?

We ask this Court to determine what efforts were made to enforce the powers of the District Court to compel a witness on the stand to divulge information which is germane to the case.

We ask this Court to bear in mind that *no privilege against self-incrimination was involved,* rather there was an ajbect refusal to answer any question or to divulge information. (See *United States v. Anglada,* 2 Cir. 10/6/75, 18 Cr. L. 2144.) We submit that the Government was not the least bit anxious to have the identity of "Toni" disclosed because they had nothing to hold over "Toni's" head since she apparently had not been indicted and therefore had not pleaded guilty to any narcotics conspiracy case. She would have been far more vulnerable to the Government since she might be motivated to tell the truth about any possible things she knew about the case rather than suffer the penalty of perjury or contempt.

We also take issue and ask this Court to reconsider and rehear that aspect of the opinion at Slip 6566 where this Court asserts that "There was no showing that either 'Georgie' or 'Toni' were material witnesses for either the prosecution or the defense."

When witnesses such as these were in contact with Rodas and Miranda on so many occasions and were present when narcotics could have been passed back and forth between them and Rodas, or money could have been passed back and forth between them and Rodas, we find it difficult to understand how this Court could say that they were not "material witnesses," therefore distinguishing the *Baum* case.

This prosecution does not do credit to the Government of the United States (*Mesarosh v. United States,* 352 U.S. 1 (1956)).

At Slip Opinion 6564, this Court holds that the denials by Judge Judd in the Court below to suppress the testimony of Government witnesses as to the March 25th conversation; the denial of the judgment of acquittal at the close of the trial on the grounds of failure to suppress such testimony; and denial of the motion to set aside the verdict and for a judgment of acquittal on the same ground, did not constitute "reversible error."

We perceive that in the use of the word "reversible," this Court is conceding that "error" was indeed made.

We think that a reconsideration and rehearing is warranted in the light of the extremely shocking circumstances of this case.

C. En Banc Rehearing Suggested

III. We respectfully submit that a case such as this should be decided *en banc* to determine what the entire Second Circuit feels should be done under the highly questionable tactics employed by a Government prosecutor.

The integrity of the judicial system is at stake. The significance of *Bryant I* and *Bryant II*, to say nothing of the *Pfingst, Morell, Baum,* and several other cases, should be explained.

We maintain that seldom will this Court have such a vehicle as the case at bar with which to set forth appropriate rules, not only from a constitutional point of view, but also in its supervisory capacity of setting forth guidelines to district courts within the Second Circuit.

The defendant has been convicted of a felony and sentenced to 6 years imprisonment. In *Coppedge v. United States,* 369 U.S. 438 at 449, our highest Court explained:

> "When society acts to deprive one of its members of life, liberty or property, it takes the most awesome steps. No general respect for, nor adherence to, the law as a whole can well be expected without need for prompt, *eminently fair* and sober criminal laws procedures. *The methods we employ in the enforcement of our criminal law* have aptly been called the measure by which the quality of our civilization may be judged." (Emphasis ours.)

We submit that a rehearing and reconsideration should be had and that upon such a reversal should be ordered.

In the event this Panel of the Court decides to deny a rehearing, or upon granting it adheres to its present determination, we respectfully request that this petition be circulated among all of the Judges of the Second Circuit to determine whether or not this case should be reheard *en banc*.

MOTION IN THE ALTERNATIVE FOR STAY OF MANDATE PENDING CERTIORARI

In view of the unusual and important considerations set forth *supra*, it is respectfully submitted that the mandate of this Court should be stayed pending the timely filing of a petition for a writ of certiorari with the Supreme Court of the United States.

Respectfully submitted,

s/ Irving Anolik
Attorney for Defendant-Appellant

Dated: December 17, 1975

CERTIFICATION OF GOOD FAITH

I, Irving Anolik, an attorney at law duly admitted to practice before this Court, hereby certify that this petition for rehearing is filed in good faith and not for the purpose of delay.

s/ Irving Anolik

Dated: December 17, 1975

AFFIDAVIT OF SERVICE

Re: U.S. v. Miranda
74-2651

STATE OF NEW JERSEY :
: ss.:
COUNTY OF MIDDLESEX :

I, Muriel Mayer , being duly sworn according to law, and being over the age of 21 upon my oath depose and say that: I am retained by the attorney for the above named Appellant .

That on the 17th day of December , 1975, I served the within Petition for Rehearing in the matter of United States of America v. Orlando Miranda , upon United States Attorney, David A. Trager, Eastern District, United States Courthouse, 225 Washington Street, Brooklyn, New York 11201 by depositing two (2) true copies of the same securely enclosed in a post-paid wrapper, in an official depository maintained by the United States Government.

Muriel Mayer
Muriel Mayer

Sworn to and subscribed
before me this 17th day
of December 1975.

Lorraine Leotta
A Notary Public of the
State of New Jersey.

LORRAINE LEOTTA
NOTARY PUBLIC OF NEW JERSEY
My Commission Expires April 13, 1977